

In re: HERMINIA RUIZ CISNEROS.
P.Q. Docket No. 99-0054.
Decision and Order.
Filed July 11, 2001.

PQ – Importation – Mango trees – Soil – Statutes at large constructive notice – Regulations constructive notice – Ability to pay – Civil penalty – Sanction policy.

The Judicial Officer (JO) affirmed the Initial Decision and Order of Administrative Law Judge Dorothea A. Baker assessing the Respondent a \$9,600 civil penalty for importing 32 live mango trees without a written PPQ permit as required by 7 C.F.R. § 319.37-3(a), without meeting the postentry quarantine conditions as required by 7 C.F.R. § 319.37-7, without ensuring that the mango trees were free of soil as required by 7 C.F.R. § 319.37-8(a), and at a port that was not a designated port of entry as required by 7 C.F.R. § 319.37-14(a). The JO concluded that the Complainant proved the violations by a preponderance of the evidence and that the \$9,600 civil penalty recommended by the Complainant was justified by the facts and circumstances. The JO found that the Respondent had actual knowledge of the regulations prior to her March 17, 1997, violations. Further, the JO stated the Plant Quarantine Act and the Federal Plant Pest Act are published in the United States Statutes at Large and the United States Code and the Respondent is presumed to know the law. The JO also stated that the regulations regarding the importation and offer for entry of prohibited and restricted articles (7 C.F.R. §§ 319.37-.37-14) are published in the *Federal Register*, thereby constructively notifying the Respondent of the requirements for the importation of mango trees. The JO rejected the Respondent's contention that she did not import the mango trees for a commercial purpose. The JO also held that the Respondent failed to prove, by producing documents, that she was not able to pay the \$9,600 civil penalty.

James A. Booth, for Complainant.

Respondent, Pro se.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 3, 1999. Complainant instituted this proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter

the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 319.37-.37-14); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) on or about March 17, 1997, Herminia Ruiz Cisneros [hereinafter Respondent] imported approximately 32 mango trees potted in soil into the United States at San Luis, Arizona, from Mexico, in violation of 7 C.F.R. § 319.37-7(a) and (b) in that the mango trees were not imported under postentry quarantine conditions, as required; (2) on or about March 17, 1997, Respondent imported approximately 32 mango trees potted in soil into the United States at San Luis, Arizona, from Mexico, in violation of 7 C.F.R. § 319.37-8(a) in that the mango trees were not imported free of sand, soil, or earth, as required; and (3) on or about March 17, 1997, Respondent imported approximately 32 mango trees potted in soil into the United States at San Luis, Arizona, from Mexico, in violation of 7 C.F.R. § 319.37-14(a) in that the mango trees were not imported at a designated port of entry, as required (Compl. ¶¶ II-IV).

On September 17, 1999, Respondent filed an Answer admitting that she imported 32 mango trees into the United States from Mexico, but claiming that she declared to an official that she was importing the mango trees.

Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] presided at a hearing in Yuma, Arizona, on December 14, 2000. James A. Booth, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent represented herself. Respondent indicated she did not speak or understand English. At Respondent's request, Complainant provided a translator for the proceeding. Respondent found the translator qualified and impartial and agreed to the use of the translator provided by Complainant. Six witnesses testified on Complainant's behalf. Complainant introduced 16 exhibits. Respondent testified, but introduced no exhibits and had no witnesses testify on her behalf.

On January 23, 2001, Respondent filed a post-hearing statement. On January 29, 2001, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Supporting Brief. On February 26, 2001, Respondent filed a second post-hearing statement entitled "Motion to Appeal."

On March 12, 2001, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) concluding Respondent's February 26, 2001, filing, entitled "Motion to Appeal," is an untimely supplement to Respondent's January 23, 2001, filing and stating the February 26, 2001, filing should not be considered; (2) finding that on March 17, 1997, Respondent imported 32 live mango trees in soil into the United States at San Luis, Arizona, from Mexico; (3) concluding Respondent's importation of 32 live mango trees in soil into the United States at San Luis, Arizona, from Mexico, violated 7 C.F.R. §§ 319.37-3, .37-7(a), (b), .37-8(a), and .37-14(a); and (4) assessing Respondent a \$9,600 civil penalty (Initial Decision and Order at 2-3, 7-8, 26).

On May 22, 2001, Respondent appealed to, and requested oral argument before, the Judicial Officer. On June 27, 2001, Complainant filed Complainant's Brief in Support of its Response to the Appeal to the Secretary from the Decision of the

Administrative Law Judge. On June 29, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's motion for oral argument and a decision.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor modifications, the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's Conclusions of Law as restated.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 7B—PLANT PESTS

§ 150aa. Definitions

As used in this chapter, except where the context otherwise requires:

. . . .

(c) "Plant pest" means any living stage of: Any insects, mites, nematodes, slugs, snails, protozoa, or other invertebrate animals, bacteria, fungi, other parasitic plants or reproductive parts thereof, viruses, or any organisms similar to or allied with any of the foregoing, or any infectious substances, which can directly or indirectly injure or cause disease or damage in any plants or parts thereof, or any processed, manufactured, or other products of plants.

§ 150ee. Regulations and conditions

The Secretary may promulgate such regulations requiring inspection of

products and articles of any character whatsoever and means of conveyance, specified in the regulations, as a condition of their movement into or through the United States, or interstate, and imposing other conditions upon such movement, as he deems necessary to prevent the dissemination into the United States, or interstate, of plant pests, in any situation in which such regulations are not authorized under the Plant Quarantine Act [7 U.S.C. 151 et seq.].

§ 150gg. Violations

. . . .

(b) Civil penalty

Any person who—

(1) violates section 150bb of this title or any regulation promulgated under this chapter[]

. . . .

may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

CHAPTER 8—NURSERY STOCK AND OTHER PLANTS AND PLANT PRODUCTS

. . . .

§ 152. “Nursery stock” defined

For the purpose of this chapter the term “nursery stock” shall include all field-grown florists’ stock, trees, shrubs, vines, cuttings, grafts, scions, buds, fruit pits, and other seeds of fruit and ornamental trees or shrubs, and other plants and plant products for propagation, except field, vegetable, and flower seeds, bedding plants, and other herbaceous plants, bulbs, and roots.

§ 154. Importation of nursery stock

(a) In general

No person shall—

- (1) import or enter into the United States any nursery stock; or
- (2) accept delivery of any nursery stock moving from any foreign country into or through the United States;

unless the movement is made in accordance with such regulations as the Secretary of Agriculture may promulgate to prevent dissemination into the United States of plant pests, plant diseases, or insect pests.

(b) Regulations

The regulations promulgated by the Secretary of Agriculture to implement subsection (a) of this section may include regulations requiring that nursery stock moving into or through the United States—

- (1) be accompanied by a permit issued by the Secretary of Agriculture prior to the movement of the nursery stock;
- (2) be accompanied by a certificate of inspection issued, in a manner and form required by the Secretary of Agriculture, by appropriate officials of the country or State from which the nursery stock is to be moved;
- (3) be grown under postentry quarantine conditions by or under the supervision of the Secretary of Agriculture for the purposes of determining whether the nursery stock may be infested with plant pests or insect pests, or infected with plant diseases, not discernible by port-of-entry inspection; and
- (4) if the nursery stock is found to be infested with plant pests or insect pests or infected with plant diseases, be subject to remedial measures the Secretary of Agriculture determines to be necessary to prevent the spread of plant pests, insect pests, or plant diseases.

§ 159. Regulations by Secretary restricting importation of plants, etc., other than “nursery stock”

Whenever the Secretary of Agriculture shall determine that the unrestricted importation of any plants, fruits, vegetables, roots, bulbs, seeds, or other plant products not included by the term “nursery stock” as defined in section 152 of this title may result in the entry into the United States or any of its Territories or Districts of injurious plant diseases or insect pests he shall promulgate his determination, specifying the class of plants and plant products the importation of which shall be restricted and the country

and locality where they are grown, and thereafter, and until such promulgation is withdrawn, such plants and plant products imported or offered for import into the United States or any of its Territories or Districts shall be subject to all the provisions of sections 154 and 156 to 158 of this title.

§ 162. Rules and regulations

The Secretary of Agriculture shall make and promulgate such rules and regulations as may be necessary for carrying out the purposes of this chapter.

§ 163. Violations; forgery, alterations, etc., of certificates; punishment; civil penalty

. . . Any person who violates any . . . provision [of this chapter or any] rule[] or regulation [promulgated by the Secretary of Agriculture under this chapter] . . . may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. §§ 150aa(c), 150ee, 150gg(b), 152, 154, 159, 162, 163.

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT
OF AGRICULTURE**

. . . .

**CHAPTER III—ANIMAL AND PLANT HEALTH
INSPECTION SERVICE,
DEPARTMENT OF AGRICULTURE**

. . . .

PART 319—FOREIGN QUARANTINE NOTICES

**SUBPART—NURSERY STOCK, PLANTS, ROOTS, BULBS,
SEEDS, AND OTHER PLANT PRODUCTS**

**§ 319.37 Prohibitions and restrictions on importation; disposal of
articles refused importation.**

(a) No person shall import or offer for entry into the United States any prohibited article, except as otherwise provided in § 319.37-2(c) of this subpart. No person shall import or offer for entry into the United States any restricted article except in accordance with this subpart.

§ 319.37-1 Definitions.

Terms used in the singular form in this subpart shall be construed as the plural, and vice versa, as the case may demand. The following terms, when used in this subpart, shall be construed respectively to mean:

....

Nursery stock. All field-grown florist's stock, trees, shrubs, vines, cuttings, grafts, scions, buds, fruit pits, and other seeds of fruit and ornamental trees or shrubs, and other plants and plant products for propagation, except field, vegetable, and flower seeds, bedding plants, and other herbaceous plants, bulbs, and roots.

....

Plant pest. The egg, pupal, and larval stages as well as any other living stage of: Any insects, mites, nematodes, slugs, snails, protozoa, or other invertebrate animals, bacteria, fungi, other parasitic plants or reproductive parts thereof, viruses, or any organisms similar to or allied with any of the foregoing, or any infectious substances, which can directly or indirectly injure or cause disease or damage in any plants or parts thereof, or any processed, manufactured, or other products of plants.

Plant Protection and Quarantine Programs. The organizational unit within the Animal and Plant Health Inspection Service, U.S. Department of Agriculture, delegated responsibility for enforcing provisions of the Plant Quarantine Act, the Federal Plant Pest Act, and related laws, and regulations promulgated thereunder.

Restricted article. Any class of nursery stock or other class of plant, root, bulb, seed, or other plant product, for or capable of propagation, excluding any prohibited articles listed in § 319.37-2(a) or (b) of this

subpart, excluding any articles subject to any restricted entry orders in 7 CFR part 321 (i.e., potatoes), and excluding any articles regulated in 7 CFR 319.8 through 319.34 or 319.41 through 319.74-7.

....

Soil. The loose surface material of the earth in which plants, trees, and shrubs grow, in most cases consisting of disintegrated rock with an admixture of organic material and soluble salts.

§ 319.37-3 Permits.

(a) The restricted articles (other than articles for food, analytical, medicinal, or manufacturing purposes) in any part of the following categories may be imported or offered for importation into the United States only after issuance of a written permit by the Plant Protection and Quarantine Programs:

....

(2) Articles subject to the postentry quarantine conditions of § 319.37-7; [and]

....

(5) Lots of 13 or more articles (other than seeds, bulbs, or sterile cultures of orchid plants) from any country or locality except Canada[.]

§ 319.37-7 Post entry quarantine.

(a) The following restricted articles, from the designated countries and localities, and any increase therefrom must be grown under postentry quarantine conditions specified in paragraphs (c) and (d) of this section, and may be imported or offered for importation into the United States only:

(1) If destined for a State that has completed a State post entry quarantine agreement in accordance with paragraph (c) of this section;

(2) If a post entry quarantine growing agreement has been completed and submitted to Plant Protection and Quarantine in accordance with paragraph (d) of this section. The agreement must be signed by the person (the importer) applying for a written permit for importation of the article in accordance with § 319.37-3; and,

(3) If Plant Protection and Quarantine has determined that the completed post entry quarantine growing agreement fulfills the applicable requirements of this section and that services by State inspectors are available to monitor and enforce the post entry quarantine:

Restricted Article
(excluding seeds)

Foreign Country(ies) or Locality(ies)
from which imported

....
Fruit and nut articles listed by common name in paragraph (b) of this section. All except Canada.
....

(b) *Fruit and nut articles* (common names are listed after scientific names).

....
Mangifera— mango

§ 319.37-8 Growing media.

(a) Any restricted article at the time of importation or offer for importation into the United States shall be free of sand, soil, earth, and other growing media, except as provided in paragraph (b), (c), (d) or (e) of this section.

§ 319.37-14 Ports of entry.

(a) Any restricted article required to be imported under a written permit pursuant to § 319.37-3(a)(1) through (6) of this subpart, shall be imported or offered for importation only at a port of entry designated by an asterisk in paragraph (b) of this section; any other restricted article shall be imported or offered for importation at any port of entry listed in paragraph (b) of this section.

(b)

LIST OF PORTS OF ENTRY

Ports with special inspection and treatment facilities (plant inspection stations) are indicated by an asterisk (*).

....
ARIZONA
....
San Luis

U.S. Border Station, P.O. Box 37, San Luis, AZ 85349.

(1998) (footnotes omitted).

**ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION AND ORDER
(AS RESTATED)**

The evidence presented at the oral hearing and the record as a whole show that Complainant has, by more than a preponderance of the evidence, established that Respondent violated 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a).¹ Complainant has further shown that the sanction, which Complainant seeks, is justified by the facts and circumstances.

Findings of Fact

1. The Animal and Plant Inspection Service [hereinafter APHIS] is an agency of the United States Department of Agriculture [hereinafter USDA]. APHIS and specifically the Plant Protection and Quarantine [hereinafter PPQ], an organizational unit of APHIS, are responsible for the administration and enforcement of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. (7 C.F.R. pts. 2, 371.) One of the fundamental purposes of the Plant Quarantine Act and the Federal Plant Pest Act is to prevent the introduction into the United States from any foreign country of plant pests, plant diseases, and injurious insects new to or not widely prevalent or distributed within and throughout the United States (Tr. 108-09; Plant Quarantine Act; Federal Plant Pest Act).

2. The Secretary of Agriculture has restricted the importation and offer for entry into the United States from Mexico, as well as from many other foreign countries, of nursery stock, plants, roots, bulbs, seeds, and other plant products and plants and trees in sand, soil, or earth (7 C.F.R. §§ 319.37-.37-14).

3. Plant pests, plant diseases, and injurious insects from foreign countries, including Mexico, pose a substantial economic threat to the trees, plants, fruits, flowers, and agricultural industries of the United States. The Mediterranean fruit fly, the Mexican fruit fly, the melon fly, the oriental fruit fly, the citrus black fly,

¹The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of proof is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Plant Quarantine Act and the Federal Plant Pest Act is preponderance of the evidence. *In re Don Tollefson*, 54 Agric. Dec. 426, 434 (1995); *In re Unique Nursery and Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 415-16 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995); *In re Christian King*, 52 Agric. Dec. 1333, 1347 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1320 (1993).

and the mango weevil are all new to or not widely prevalent or distributed within and throughout the United States. They are examples of plant pests that pose a substantial threat to United States agriculture and the United States economy. The introduction into the United States of plant pests, plant diseases, or injurious insects new to or not widely prevalent or distributed within and throughout the United States could be quite devastating for several reasons. Not only could the introduced pest, disease, or insect destroy the affected crops, fruits, trees, or plants, but also, the introduced pest, disease, or insect could require an expensive treatment or eradication program, the quarantine of areas or entire states where the affected crops, fruits, trees, or plants are grown, and compensation to farmers and others for the financial losses incurred. The export of the affected crops, fruits, trees, or plants could also be restricted or prohibited causing significant financial losses to producers and exporters of the affected agricultural products. Past introductions of the Mediterranean fruit fly in California have cost billions of dollars in crop and revenue losses. An outbreak of Karnal bunt forced a quarantine of the State of Arizona and parts of the State of New Mexico and the State of Texas. The marketability and value of wheat from fields infected with Karnal bunt were significantly affected. (Tr. 108-16.)

4. APHIS administers USDA efforts to prevent the introduction of plant pests, plant diseases, and injurious insects from foreign countries. APHIS relies heavily upon PPQ personnel at United States ports of entry to prevent plant pests, plant diseases, and injurious insects from entering the United States and causing significant agricultural and economic damage within the United States. (Tr. 108-11.)

5. USDA's efforts to prevent the introduction of plant pests, plant diseases, and injurious insects into the United States costs hundreds of millions of dollars a year in federal funds and also significant amounts in state funds. In 1999, the majority of PPQ's annual budget of approximately \$450 million was dedicated to preventing plant pests, plant diseases, and injurious insects from entering the United States. In 1999, PPQ intercepted approximately 500,000 fruits, plants, and other products which are not allowed to be imported into the United States from foreign countries. At the port of San Luis, Arizona, alone, in 1999, there were approximately 3,600 interceptions of fruits, plants, and other products which are not allowed to be imported into the United States from Mexico. (Tr. 108-11.)

6. Respondent is an individual whose mailing address is P.O. Box 2312, San Luis, Arizona 85349 (Appeal Pet. ¶ 1).

7. Before March 17, 1997, Respondent was aware of the requirements for the importation into the United States from Mexico of live plants in soil at designated ports and the applicable postentry quarantine requirements for such importations. On February 11, 1997, Respondent was stopped at the port of

San Luis, Arizona, and 24 live trees in soil were found hidden under a blanket in the back of her automobile. Respondent did not have a permit to import the trees. On February 11, 1997, at the port of San Luis, Arizona, the trees in soil hidden in Respondent's vehicle were seized and a PPQ inspector gave Respondent an APHIS Notice of Alleged Violation form, which she signed. The February 11, 1997, Notice of Alleged Violation form lists "7 C.F.R. 319.37, 319.56, 330, 320" as the regulations Respondent violated by the illegal importation into the United States from Mexico of the 24 trees in soil on February 11, 1997. A United States Customs inspector, who is fluent in Spanish, read and explained the February 11, 1997, Notice of Alleged Violation form to Respondent. The PPQ inspector who executed the February 11, 1997, Notice of Alleged Violation form also explained to Respondent, through a United States Customs inspector who is fluent in Spanish, the regulations listed on the Notice of Alleged Violation form and explained to Respondent the types of plants that could be imported into the United States from Mexico and all the procedures, conditions, and requirements necessary for such importations. The February 11, 1997, Notice of Alleged Violation form states that Respondent agreed to pay a \$100 civil penalty in settlement for violating the regulations listed on the February 11, 1997, Notice of Alleged Violation form. Respondent acknowledged by her signature on the February 11, 1997, Notice of Alleged Violation form that she was paying the \$100 civil penalty in settlement for violating the regulations listed on the February 11, 1997, Notice of Alleged Violation form. (Tr. 18-22, 42-70; CX 1 at 1, CX 11 at 1, CX 13-CX 17.)

8. The 24 live trees in soil seized from Respondent on February 11, 1997, far exceeded the average number of plants typically seized by PPQ officials at the port of San Luis, Arizona. Up to that time, the seizure of the 24 trees was the largest quantity of plants in soil ever confiscated by PPQ at the port of San Luis, Arizona. Twenty of the 24 live trees were potted in 5-gallon containers of soil and four of the trees were potted in 1-gallon containers. The total amount of all the soil imported weighed approximately 200 to 300 pounds. (Tr. 30, 52-53, 67-70, 117; CX 13, CX 14.)

9. On March 17, 1997, Respondent imported into the United States at the port of San Luis, Arizona, from Mexico, 32 live mango trees potted in soil. Respondent did not obtain a written PPQ permit to import the mango trees and did not import the mango trees in accordance with the required postentry quarantine conditions. Respondent did not import the mango trees at a designated PPQ port of entry since the port of San Luis, Arizona, is not a designated PPQ port of entry. (Tr. 22-28, 34-36, 71-84; CX 1, CX 2, CX 4-CX 11.)

10. PPQ officers at the port of San Luis, Arizona, on April 2, 1997, destroyed the 32 mango trees in soil in accordance with USDA regulations (Tr. 82).

11. PPQ's seizure of the 32 live mango trees in soil far exceeded the average number or amount of articles typically seized by PPQ officials at the port of San Luis, Arizona. The seizure of the 32 mango trees is the largest quantity of

plants in soil ever seized from an individual by PPQ officials at the port of San Luis, Arizona. Usually, only one or two plants in soil are ever intercepted by PPQ at San Luis, Arizona. The 32 live mango trees were potted in 5-gallon containers of soil and the total amount of all the soil imported weighed approximately 300 to 350 pounds. Usually, only one or two plants potted in soil with the total amount of the soil weighing a few pounds are ever intercepted by PPQ at San Luis, Arizona. (Tr. 76-77, 83, 86, 117.)

12. The 32 live mango trees seized from Respondent on March 17, 1997, were grafted trees, which means that there was a significant amount of labor involved in preparing and grafting the mango saplings into the older 12-inch root stock parts of the mango tree. Grafting is used in the commercial production of fruit trees. (Tr. 74-76.)

13. The 32 live mango trees seized from Respondent on March 17, 1997, at the port of San Luis, Arizona, could harbor many different types of plant pests (Tr. 108-17).

14. The risk of the introduction of plant pests, plant diseases, and injurious insects posed by the importation of soil is higher than the risk posed by the importation of other agricultural products. The soil imported by Respondent could have contained a variety of harmful plant pests or insects or their eggs, pupae, or larvae; noxious weeds; nematodes; or fungal and bacterial pathogens. Often a component in the process or life cycle of a particular plant pest, plant disease, or insect exists in soil. (Tr. 114-16.)

15. Respondent's importation from Mexico of 32 live mango trees and approximately 300 pounds of soil on March 17, 1997, presented a significant risk of introducing plant pests, plant diseases, and injurious insects into the United States. Such a large number of live trees and large quantity of soil thereby considerably undermined APHIS' efforts to safeguard the United States from plant pests, plant diseases, and injurious insects. (Tr. 108-20.)

Statement of the Applicable Law

Pursuant to sections 1 and 5 of the Plant Quarantine Act (7 U.S.C. §§ 154, 159) and section 106 of the Federal Plant Pest Act (7 U.S.C. § 150ee), the Secretary of Agriculture has determined that, in order to prevent the introduction into the United States of certain plant pests, plant diseases, and insects, it is necessary to restrict the importation into the United States of certain articles from foreign countries and localities.

The regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act provide that no person shall import or offer for entry into the United States any restricted article except in accordance with all applicable restrictions in

7 C.F.R. §§ 319.37-.37-14 (7 C.F.R. § 319.37(a)). A “restricted article” is defined as any class of nursery stock or other class of plant for, or capable of, propagation, excluding articles not relevant to this proceeding (7 C.F.R. § 319.37-1). Mango trees are listed as restricted articles in 7 C.F.R. § 319.37-7. Since mango trees are listed as restricted articles in 7 C.F.R. § 319.37-7, they are subject to the postentry quarantine conditions of 7 C.F.R. § 319.37-7.

The regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act list categories of restricted articles that may be imported or offered for importation into the United States only after PPQ issues a written permit (7 C.F.R. § 319.37-3(a)). One of these categories is all articles subject to the postentry quarantine conditions in 7 C.F.R. § 319.37-7 (7 C.F.R. § 319.37-3(a)(2)). Mango trees are restricted articles subject to the postentry conditions of 7 C.F.R. § 319.37-7. Thus, mango trees may be imported or offered for importation into the United States from Mexico only after PPQ issues a written permit pursuant to 7 C.F.R. § 319.37-3. Another category of restricted articles that may be imported or offered for importation into the United States only after PPQ issues a written permit is lots of 13 or more articles (7 C.F.R. § 319.37-3(a)(5)). Respondent imported 32 articles.

Moreover, restricted articles, at the time of importation or offer for importation into the United States, must be free of sand, soil, earth, and other growing media except under circumstances not relevant to this proceeding (7 C.F.R. § 319.37-8(a)). Finally, 7 C.F.R. § 319.37-14(a) requires that restricted articles required to be imported under a written PPQ permit pursuant to 7 C.F.R. § 319.37-3(a)(1)-(6) must be imported or offered for importation into the United States only at a port of entry designated by an asterisk in 7 C.F.R. § 319.37-14(b). The port of San Luis, Arizona, listed in 7 C.F.R. § 319.37-14(b), is not designated with an asterisk and is therefore not a designated port of entry for restricted articles required to be imported under a written PPQ permit pursuant to 7 C.F.R. § 319.37-3(a)(1)-(6).

Discussion

The 32 live mango trees in soil imported by Respondent into the United States at the port of San Luis, Arizona, from Mexico, on March 17, 1997, resulted in a number of violations. Respondent imported the mango trees without a written PPQ permit in violation of 7 C.F.R. § 319.37-3(a). Respondent imported the mango trees without meeting the postentry quarantine requirements in violation of 7 C.F.R. § 319.37-7. Respondent did not import the mango trees free of sand, soil, earth, and other growing media in violation of 7 C.F.R. § 319.37-8(a). Respondent did not import the mango trees at a designated port of entry in violation of 7 C.F.R. § 319.37-14(a). Thus, the importation of each mango tree in soil violated 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a).

Respondent never disputed the fact that on March 17, 1997, she imported

32 live mango trees potted in soil into the United States from Mexico without a permit, without meeting the postentry quarantine requirements, and at a port which is not a designated port of entry. At no time did Respondent ever assert or present any evidence that she had a permit to import the mango trees. At no time did Respondent ever assert or present any evidence that her importation of the mango trees met the postentry quarantine requirements. At no time did Respondent ever assert or present any evidence that she imported the mango trees free of soil. At no time did Respondent ever assert or present any evidence that she imported the mango trees at a designated port of entry or that San Luis, Arizona, was a designated port of entry.

Respondent admitted in her Answer that she imported the mango trees. In addition, Respondent admitted in an affidavit which she executed on May 7, 1998, that she imported the mango trees and did not declare the mango trees, as follows:

On March 17, 1997, I entered the United States from Mexico in my Ford Escort with Arizona Plate KPK561. I was hauling 32 mango trees that I got them in Mexico, San Luis, Colorado, Mexico. I was going to plant some and give the rest as gifts. I did not declared [sic] these trees to the U.S. Officials. The trees were also in dirt from Mexico.

CX 11 at 1.

A Spanish-speaking PPQ officer read and explained the contents of Respondent's affidavit to Respondent before she signed it (Tr. 100-05; CX 11 at 2, CX 12).

Respondent claimed in her Answer that she had declared to an official that she was importing mango trees from Mexico. Respondent made the same claim in her testimony at the hearing and additionally denied that she hid the mango trees and claimed that she was uncertain as to whether she could bring the mango trees into the United States, as follows:

DIRECT TESTIMONY

THE WITNESS: What I wanted to say that at no time did I not declare what I had. And also this thing about that I was hiding the things, that's not true either.

Yes, I did have a blanket in the car but it was -- the blanket was with the purpose that my carpet in the car would not get dirty. And like I told you, my car has a trunk and then there's a window where you can see into the

trunk. And that's why I couldn't really have hidden them.

And this man that went to my house, what they said, everything that they say is fine, except for the part where they said I didn't declare the trees. Because whenever I cross the border, I always declare what I have because sometimes I don't know what's forbidden or not. And that's why when they always ask you what do you have, and so you have to tell them what you have. And that's all that I wanted to say that at no time did I hide the trees or did I not tell them that I had them.

The second officer that gave his statement, that officer is very -- is a very good, nice officer with me and with everybody else that crosses. What happens, he probably does not remember because it's been such a long time, he does not remember what I told him.

And the other one; well he is a little bit more -- how can I tell you, he's like bad character. Most of the time he's angry.

And that's all that I wanted to say.

Tr. 123-24.

Complainant presented both testimony and physical evidence which establishes that on March 17, 1997, Respondent imported 32 live mango trees potted in soil from Mexico into the United States without a permit, without meeting the postentry quarantine requirements, and at a port which is not a designated PPQ port of entry. Respondent actually does not contest the violations of 7 C.F.R. §§ 319.37-3(a), .37-7, .37.8(a), and .37.14(a), except to claim that upon arrival at San Luis, Arizona, she declared that she was importing the mango trees into the United States. In addition to Respondent's admission in her affidavit (CX 11) that she did not declare the 32 live mango trees, the record contains overwhelming testimony that Respondent did not declare that she was importing the mango trees.

Respondent was thoroughly informed of the applicable regulations for the importation of plants and trees from Mexico on February 11, 1997. The 24 trees in soil that Respondent imported on February 11, 1997, were confiscated from her and she paid a \$100 civil penalty for importing the 24 trees in soil (Tr. 47-48; CX 13). Moreover, on February 11, 1997, Respondent signed a Notice of Alleged Violation form, which lists all the regulations that Respondent had violated by importing the 24 live trees in soil, and PPQ inspector Jeffery Robert Alling explained to Respondent the requirements for the importation of plants and trees from Mexico (Tr. 49-50, 58-62; CX 13). Thus, on February 11, 1997, Respondent had actual notice of the applicable regulations for the importation of trees in soil.

United States Customs inspector Fernando Carlo Castillo was personally involved in Respondent's February 11, 1997, and March 17, 1997, importations of live trees in soil at the port of San Luis, Arizona. Inspector Castillo personally prepared a United States Customs Service Incident/Witness Statement which describes Respondent's two importations. (Tr. 16-17; CX 1.)

Inspector Castillo states in his Incident/Witness Statement that he was at the primary inspection station at the port of San Luis, Arizona, on February 11, 1997, when Respondent came to the inspection station. Inspector Castillo states he asked Respondent for both a customs and an agricultural declaration and she responded that she had nothing from Mexico. Inspector Castillo noticed Respondent's hand shaking and asked her to open the trunk of her car. He noticed a blanket covering plants and soil. (CX 1.)

Additionally, inspector Castillo testified that he asks a person (usually the driver of the vehicle) entering primary inspection: "[d]o you have anything to declare such as plants, fruits, medicines, any alcoholic beverages, monetary instruments more than \$10,000." (Tr. 19-20.) Inspector Castillo testified that he asked Respondent for a customs and an agricultural declaration and that "Respondent answered that she had nothing to declare" (Tr. 19).²

United States Immigration and Naturalization Service [hereinafter INS] inspector Luis Lemus testified that he was at the primary inspection station at the port of San Luis, Arizona, on March 17, 1997, when Respondent came to the primary inspection station. INS inspector Lemus testified that he asked Respondent if she was bringing anything from Mexico. (Tr. 34.) INS inspector Lemus testified that Respondent "said she was not bringing anything from Mexico" (Tr. 34-35). INS inspector Lemus further testified that he normally asks people twice for a declaration, but he asks a second time in a different way (Tr. 35). So, INS inspector Lemus again asked Respondent if she had anything in the trunk of her car and "she said no the second time" (Tr. 35).

Despite the two negative declarations by Respondent, INS inspector Lemus asked Respondent to open the trunk of her car and discovered the mango trees in the trunk (Tr. 35-36). Respondent cross-examined INS inspector Lemus about his recollection of her two negative declarations on March 17, 1997, and he confirmed that Respondent made two negative declarations (Tr. 37-38).

At approximately 11:30 p.m., on March 17, 1997, United States Customs inspector Castillo was called over to INS inspector Lemus' primary inspection station and was informed that there was a violation (Tr. 23-26). Since there are no

²Spanish is inspector Castillo's native language and he is fluent in Spanish (Tr. 15). At primary inspection on February 11, 1997, inspector Castillo spoke to Respondent in Spanish (Tr. 20).

USDA inspectors on duty at the port of San Luis, Arizona, at that time of night, United States Customs inspector Castillo took Respondent to secondary inspection (Tr. 23-25, 62-64). At secondary inspection, inspector Castillo completed a United States Customs Notice of Abandonment and Assent to Forfeiture of Prohibited or Seized Merchandise and Certificate of Destruction form (Tr. 25-26; CX 2). This United States Customs form lists the 32 mango trees as the articles abandoned by Respondent. Respondent signed the form acknowledging that she was abandoning all claim to the 32 mango trees (Tr. 25-26; CX 2). Since PPQ inspectors were not on duty, United States Customs inspector Castillo was instructed by his supervisor to fill out the United States Customs Notice of Abandonment and Assent to Forfeiture of Prohibited or Seized Merchandise and Certificate of Destruction form and present it to PPQ the next morning (Tr. 22-25). On March 18, 1997, PPQ inspector Alling found the 32 mango trees in soil at secondary inspection along with the United States Customs Notice of Abandonment and Assent to Forfeiture of Prohibited or Seized Merchandise and Certificate of Destruction form (Tr. 73-74). PPQ inspector Alling met with United States Customs inspector Castillo on March 18, 1997, to obtain information about Respondent's violations and to request inspector Castillo to prepare a United States Customs Service Incident/Witness Statement (Tr. 17, 90-91; CX 1). PPQ inspector Alling took photographs of these 32 mango trees in soil (Tr. 79-83; CX 4-CX 10).

INS inspector Lemus testified that on March 17, 1997, at the primary inspection station, Respondent twice declared that she was not importing anything from Mexico. Inspector Lemus' testimony that Respondent twice declared she was not importing anything from Mexico is credible considering that it was not coincidental that Respondent imported the 32 live mango trees on March 17, 1997, at approximately 11:30 p.m. (Tr. 25-26). Respondent is and has been a resident of San Luis, Arizona (CX 11, CX 13). It is the common knowledge of the residents of San Luis, Arizona, and the surrounding area that USDA inspectors are never on duty at the port of San Luis, Arizona, after approximately 8:00 p.m.³ (Tr. 29, 62-63, 117-19). William T. Hyde, the PPQ director of the port of San Luis, Arizona, testified that this policy of not having PPQ personnel at the port after approximately 8:00 p.m. has been in effect for the entire 25 years he has been the San Luis, Arizona, port director (Tr. 107, 118). Respondent had been thoroughly informed on February 11, 1997, that she could not import plants or trees at the port of San Luis, Arizona, even if she did have a permit. Nevertheless, just 5 weeks later, on March 17, 1997, Respondent not only imported 32 mango trees in soil at the port of San Luis, Arizona, but she did so at approximately 11:30 p.m., when it is commonly known that no PPQ inspectors are on duty (Tr. 25-26).

³PPQ does not have the personnel to staff the port at San Luis, Arizona, after 8:00 p.m. Moreover, since San Luis, Arizona, is not a PPQ designated port of entry, PPQ personnel are normally not expected to or needed to process importations that require a permit. (Tr. 62-64, 118-20.)

Respondent was fully informed on February 11, 1997, of all applicable regulations for the importation of plants and trees from Mexico. Moreover, regulations for the importation of plants and trees from Mexico are published in the *Federal Register*, thereby constructively notifying Respondent of the regulations. In order to achieve the congressional purposes of the Plant Quarantine Act and the Federal Plant Pest Act, violators are held responsible for their violations irrespective of their lack of evil motive or intent to violate the Plant Quarantine Act, the Federal Plant Pest Act, or the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act.⁴

USDA regulations regarding the importation of plants and trees in soil were fully explained to Respondent on February 11, 1997. PPQ inspector Alling personally completed the APHIS Notice of Alleged Violation form dated February 11, 1997 (Tr. 42; CX 13, CX 14). PPQ inspector Alling testified that he informed Respondent through a United States Customs inspector, who is fluent in Spanish, of all the USDA regulations that Respondent had violated on February 11, 1997. PPQ inspector Alling informed Respondent in detail through the same Spanish-speaking United States Customs inspector of the types of plants and trees that could be imported from Mexico and the procedures, conditions, and requirements necessary for such importations. (Tr. 44-45, 58-62, 64-66, 85-86; CX 13, CX 14.)

Thus, PPQ inspector Alling explained to Respondent, among other requirements and conditions for the importation of plants and trees, that plants and trees could not be imported with soil; that is, the plants and trees would have to be bare-rooted. PPQ inspector Alling also explained to Respondent that bare-rooted plants and trees would have to be imported under a written permit and would have to meet postentry quarantine requirements. Moreover, PPQ inspector Alling explained to Respondent that the bare-rooted plants and trees would have to be imported at a designated PPQ port of entry and that the port of San Luis, Arizona, was not a designated PPQ port of entry. PPQ inspector Alling further explained to Respondent that the designated PPQ ports of entry closest to San Luis, Arizona, were Nogales, Arizona, and San Ysidro, California. Nevertheless, Respondent totally ignored all of the USDA regulations that had been fully explained to her on February 11, 1997, and imported 32 live mango trees in soil into the United States at San Luis, Arizona, on March 17, 1997.

Section 108(b) of the Federal Plant Pest Act authorizes the Secretary of Agriculture to assess a civil penalty of not more than \$1,000 for each violation of

⁴*In re Rafael Dominquez*, 60 Agric. Dec. 199, 207 (2001); *In re Cynthia Twum Boafu*, 60 Agric. Dec. 191, 195 (2001); *In re Mercedes Capistrano*, 45 Agric. Dec. 2196, 2198 (1986); *In re Rene Vallalta*, 45 Agric. Dec. 1421, 1423 (1986).

the Federal Plant Pest Act and the regulations issued under the Federal Plant Pest Act (7 U.S.C. § 150gg(b)). Section 10 of the Plant Quarantine Act authorizes the Secretary of Agriculture to assess a civil penalty of not more than \$1,000 for each violation of the Plant Quarantine Act and the regulations issued under the Plant Quarantine Act (7 U.S.C. § 163).

The regulations, 7 C.F.R. §§ 319.37-.37-14, were, during all times relevant to this proceeding, and are, an integral and significant part of the federal effort to prevent the introduction into the United States from any foreign country of plant pests, plant diseases, and injurious insects new to or not widely prevalent or distributed within and throughout the United States. APHIS and PPQ administer programs designed to prevent the introduction into the United States of plant pests, plant diseases, and injurious insects. APHIS and PPQ rely heavily upon PPQ personnel at United States ports of entry as one of several means of preventing the dissemination of plant pests, plant diseases, and injurious insects into the United States. (Tr. 106-20.) At the port of San Luis, Arizona, alone, in 1999, there were approximately 3,600 interceptions of articles imported into the United States in violation of the plant quarantine laws and the regulations issued under those laws. PPQ nationwide, in 1999, made approximately 500,000 interceptions of articles imported into the United States in violation of the plant quarantine laws and the regulations issued under those laws. Most of PPQ's 1999 budget of \$454 million was spent on preventing the dissemination of plant pests, plant diseases, and injurious insects into the United States. PPQ's interception programs have been very effective in preventing the introduction and spread of plant pests, plant diseases, and injurious insects from Mexico and other foreign countries into the United States. Very serious and damaging, if not devastating, agricultural and economic effects would result if PPQ was not successful in preventing the introduction of plant pests, plant diseases, and injurious insects into the United States. Only one plant pest from the 32 live mango trees or the approximately 300 pounds of soil imported by Respondent into the United States from Mexico could have caused millions or even billions of dollars of damage to the United States. (Tr. 108-20.)

The success of PPQ's programs to protect United States agriculture by preventing the dissemination of plant pests, plant diseases, and injurious insects into the United States is greatly dependent upon compliance of individuals, such as Respondent, with the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. Without strict adherence to USDA regulations by individuals like Respondent, there is a significant risk of the introduction into the United States of plant pests, plant diseases, and injurious insects. Thus, the imposition of a significant sanction in a case such as this one is necessary to deter Respondent and other potential violators from future violations of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest

Act. *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 629 (1988).

USDA's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In light of this sanction policy, the sanction recommendations of administrative officials charged with the responsibility for achieving the congressional purposes of the Plant Quarantine Act and the Federal Plant Pest Act are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of programs designed to prevent the introduction of plant pests, plant diseases, and injurious insects into the United States.

Respondent's importation into the United States from Mexico of 32 live mango trees in soil presented a significant risk of introducing plant pests, plant diseases, and injurious insects into the United States. Respondent's violations thereby undermined APHIS' efforts to safeguard the United States from plant pests, plant diseases, and injurious insects. The harmful effects of plant pests, plant diseases, and injurious insects to the United States and United States agricultural exports could be very significant and costly. (Tr. 106-20.)

Sanctions are essential to discourage and prevent violations like the ones in this case. Respondent was fully aware of the regulations applicable to the importation into the United States from Mexico of plants, trees, and plants and trees in soil on February 11, 1997 (Tr. 58-62, 64-66, 85-86; CX 13, CX 14). On February 11, 1997, Respondent paid a \$100 civil penalty for importing into the United States 24 live trees in soil (Tr. 47-48; CX 13). Yet, just 5 weeks later, on March 17, 1997, Respondent imported 32 live trees in soil. These 32 live mango trees imported on March 17, 1997, far exceeded the average number of articles typically confiscated by PPQ at the port of San Luis, Arizona. PPQ typically intercepts only fresh fruit or a few plants or trees in soil. (Tr. 30, 83, 86, 89, 110, 117.) Respondent's importation of 32 live mango trees, along with approximately 300 pounds of soil, was not a typical importation. Respondent's importation was a commercial importation. (Tr. 74-78.) Thus, Respondent's unusually large importation of 32 live mango trees in soil was significantly more risky than the typical number and

amount of prohibited or restricted products intercepted by PPQ. Respondent's importation seriously undermined USDA's efforts to enforce the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. Accordingly, at the oral hearing, Complainant's attorney, on behalf of Complainant, requested a civil penalty of \$300 for each live mango tree in soil that Respondent imported into the United States at the port of San Luis, Arizona, from Mexico, on March 17, 1997. Since Respondent imported 32 live mango trees in soil, the total civil penalty would be \$9,600. (Tr. 144-45.)

The imposition of the requested \$9,600 sanction is justified and necessary in this case to deter Respondent and other potential violators from future violations of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. Had it not been for Complainant's recommendation, I would have imposed a far greater civil penalty.

I find Respondent's protestation that she declared the 32 live mango trees to United States officials when she entered the United States lacks credibility. INS inspector Lemus testified that on March 17, 1997, at the primary inspection station, he twice asked Respondent if she had anything to declare from Mexico (Tr. 34-35). INS inspector Lemus testified that Respondent "said she was not bringing anything from Mexico" (Tr. 34-35). On cross-examination, INS inspector Lemus confirmed that Respondent made two negative declarations (Tr. 38). Moreover, Respondent herself, in her sworn affidavit, regarding the importation on March 17, 1997, admitted that she "did not declared [sic] these trees to the U.S. Officials" (CX 11 at 1).

Even if I found that Respondent had declared the 32 live mango trees on March 17, 1997, immediately upon entry into United States (which I do not so find), Respondent's declaration would not be a defense to her violations of 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a). It is well settled that a voluntary declaration of a prohibited or restricted article before a search of a respondent's possessions has begun is a mitigating circumstance, but the declaration does not operate as a defense to a violation of the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act.⁵

For all the reasons discussed in this Decision and Order, Complainant's request for the imposition of a \$9,600 civil penalty to deter Respondent and other potential violators from future violations of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act is fully justified and warranted by the circumstances of this proceeding.

⁵*In re Mr. Francisco Escobar, Jr.*, 54 Agric. Dec. 392, 416-17 (1995), *aff'd per curiam*, 68 F.3d 466 (5th Cir. 1995) (Table); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 630-31, 638 (1988); *In re Lawrence Craig*, 47 Agric. Dec. 606, 607 (1988); *In re Richard Duran Lopez*, 44 Agric. Dec. 2201, 2207-08 (1985); *In re Francisco Ramos*, 44 Agric. Dec. 1447 (1985) (Ruling on Recons.).

Conclusions of Law

Based on the record and by reason of the Findings of Fact, the evidence establishes that Respondent imported 32 live mango trees in soil into the United States at San Luis, Arizona, from Mexico, on March 17, 1997. The importation of each mango tree in soil violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises four issues in Respondent's Motion to Appeal (Oral Argument) [hereinafter Appeal Petition]. First, Respondent contends she did not know that the importation into the United States at San Luis, Arizona, from Mexico, of 32 mango trees on March 17, 1997, violated 7 C.F.R. §§ 319.37-3, .37-7(a), (b), .37-8(a), and .37-14(a) (Appeal Pet. ¶¶ 2-5).

The Plant Quarantine Act and the Federal Plant Pest Act are published in the United States Statutes at Large and the United States Code, and Respondent is presumed to know the law.⁶ Moreover, the regulations concerning the importation into the United States of mango trees in soil are published in the *Federal Register*, thereby constructively notifying Respondent of the requirements for importation.⁷ Therefore, Respondent's purported lack of actual knowledge of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act is not a defense to Respondent's violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a). Moreover, as the ALJ fully discussed in the Initial Decision and Order, the evidence establishes that, as of February 11, 1997, Respondent had actual knowledge of the regulations concerning

⁶See *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925); *Johnston v. Iowa Dep't of Human Servs.*, 932 F.2d 1247, 1249-50 (8th Cir. 1991).

⁷See *FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *United States v. Tijerina*, 407 F.2d 349, 354 n.12 (10th Cir.), cert. denied, 396 U.S. 867, and cert. denied, 396 U.S. 843 (1969); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965).

the importation of plants and trees in soil into the United States from Mexico.

Second, Respondent contends she imported the 32 mango trees as gifts to family members and friends and she did not import the mango trees for commercial purposes (Appeal Pet. ¶ 6).

The purpose for which Respondent imported the 32 mango trees is not a defense to Respondent's violations of 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a). Further, as the ALJ fully discussed in the Initial Decision and Order, the evidence establishes that Respondent imported the 32 mango trees into the United States for commercial purposes (Tr. 74-78).

Third, Respondent contends she is not a criminal and states "I feel that the system see's [sic] me as a hard case criminal" (Appeal Pet. ¶ 6).

This proceeding is not a criminal prosecution. Instead, this proceeding is a civil disciplinary administrative proceeding in which the Secretary of Agriculture is authorized to assess a civil penalty for violations of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. My conclusion that Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 319.37-3(a), .37-7, .37-8(a), and .37-14(a) does not constitute a conclusion that Respondent has committed a criminal offense.

Fourth, Respondent contends she cannot afford to pay a \$9,600 civil penalty (Appeal Pet. ¶ 6).

A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be assessed in animal quarantine cases and plant quarantine cases.⁸ However, the burden is on the respondents in animal quarantine cases and plant quarantine cases to prove, by producing documentation, the lack of ability to pay the civil penalty.⁹ Respondent has failed to produce any documentation supporting her assertion that she lacks the ability to pay a \$9,600 civil penalty, and Respondent's undocumented assertion that she lacks the ability to pay the civil penalty falls far short of the proof

⁸*In re Rafael Dominguez*, 60 Agric. Dec. 199, 208-09 (2001); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 197 (2001); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 912-13 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

⁹*In re Rafael Dominguez*, 60 Agric. Dec. 199, 209 (2001); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 197-98 (2001); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

necessary to establish an inability to pay the civil penalty.¹⁰

Respondent has not raised the issue of the amount of the civil penalty in her Appeal Petition, except in the context of her purported inability to pay the civil penalty. However, I note *sua sponte* that Complainant's sanction recommendation and the ALJ's assessment of a civil penalty are based on the number of trees Respondent imported into the United States rather than on the number of provisions of the regulations Respondent violated (Tr. 144-45; Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Supporting Brief at 22; Initial Decision and Order at 23-26). I agree with the ALJ's assessment of a civil penalty based on the number of trees Respondent imported. This approach to the assessment of civil penalties for violations of the Plant Quarantine Act and the regulations issued under the Plant Quarantine Act is authorized by section 10 of the Plant Quarantine Act (7 U.S.C. § 163). Further, this approach to the assessment of civil penalties for violations of the Federal Plant Pest Act and the regulations issued under the Federal Plant Pest Act is authorized by section 108(b) of the Federal Plant Pest Act (7 U.S.C. § 150gg(b)). Moreover, this per-tree approach to the assessment of civil penalties is similar to the per-box approach I have taken in cases involving the interstate movement of boxes of Mexican Hass avocados in violation of regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act.¹¹ Finally, I find the approach to the assessment of civil penalties taken by the ALJ reflects the gravity of Respondent's violations. While the importation or offer for entry of a single tree in violation of regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act could cause the introduction into the United

¹⁰See *In re Rafael Dominguez*, 60 Agric. Dec. 199, 209 (2001) (holding the undocumented assertion by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 198 (2001) (holding undocumented assertions by the respondent that she was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919-20 (1998) (holding undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998) (holding undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

¹¹*In re Rafael Dominguez*, 60 Agric. Dec. 210 (2001); *In re Calzado Leon*, 59 Agric. Dec. 770 (2000); *In re La Fortuna Tienda*, 58 Agric. Dec. 833 (1999).

States of plant pests, plant diseases, and injurious insects, the risk of the introduction into the United States of plant pests, plant diseases, and injurious insects increases with each additional prohibited or restricted article that is imported or offered for entry into the United States in violation of the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act.

Section 108(b) of the Federal Plant Pest Act (7 U.S.C. § 150gg(b)) provides that any person violating the Federal Plant Pest Act or any regulation promulgated under the Federal Plant Pest Act may be assessed by the Secretary of Agriculture a civil penalty not exceeding \$1,000. Section 10 of the Plant Quarantine Act (7 U.S.C. § 163) provides that any person violating the Plant Quarantine Act or any regulation promulgated under the Plant Quarantine Act may be assessed by the Secretary of Agriculture a civil penalty not exceeding \$1,000. Respondent committed 128 violations of the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act: viz., 32 violations of 7 C.F.R. § 319.37-3(a), 32 violations of 7 C.F.R. § 319.37-7, 32 violations of 7 C.F.R. § 319.37-8(a), and 32 violations of 7 C.F.R. § 319.37-14(a). Thus, Respondent could be assessed a maximum civil penalty of \$128,000.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent is assessed a \$9,600 civil penalty. The civil penalty shall be paid by a certified check or money order, made payable to the "Treasurer of the United States," and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0054.
